FLAG

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June 30, 2003

Ms. Tess Butler
Grain Inspection, Packers and Stockyards Administration
United States Department of Agriculture
1400 Independence Avenue, Rm. 1647-S
Washington, DC 20250-3604

Re: Comments on Notice of Grain Inspection, Packers and Stockyards Administration Livestock and Meat Marketing Study, 68 Federal Register 32455, May 30, 2003

Dear Ms. Butler:

Farmers' Legal Action Group, Inc. (FLAG) submits these comments on behalf of the Campaign for Family Farms (CFF) and the Western Organization of Resource Councils (WORC) concerning the Notice of Grain Inspection, Packers and Stockyards Administration (GIPSA) Livestock and Meat Market Study, published at 68 Federal Register 32,455 (May 30, 2003) (Proposed Study).

CFF is an association of family farm and community membership organizations including Iowa Citizens for Community Improvement, the Missouri Rural Crisis Center, the Land Stewardship Project, the Illinois Stewardship Alliance, and Citizens Action Coalition of Indiana. The membership in CFF's five state organizations exceeds 260,000.

WORC is a network of grassroots organizations from seven states that includes 8,250 members and 49 local community groups. WORC's seven state organizations are: the Dakota Resource Council (North Dakota), Dakota Rural Action (South Dakota), the Idaho Rural Council (Idaho), the Northern Plains Resource Council (Montana), Oregon Rural Action (Oregon), the Powder River Basin Resource Council (Wyoming), and the Western Colorado Congress (Colorado).

For the reasons set forth below, WORC and CFF both strongly believe that the proposed study is *not* a necessary prerequisite for Congress or USDA to take the actions that are needed right now to preserve fair and competitive agricultural markets and healthy rural communities.

History of Responses to Concentration in the Meat Industry

Concerns about concentration in the meatpacking industry are not new. Those concerns in the late 1800s and early 1900s led to the passage of the Sherman and Clayton Antitrust Acts. The 1917 investigation of the meatpacking industry by the Federal Trade Commission led to the passage of the Packers and Stockyards Act of 1921.

Over the past twenty years, the meatpacking industry has undergone a far-reaching structural transformation characterized by a combination of concentration and vertical integration. In 2000, four firms controlled 81 percent of the beef processing industry and four firms controlled 56 percent of the nation's hog processing industry. USDA Grain Inspection, Packers and Stockyards Administration, *Assessment of the Cattle and Hog Industries Calendar Year 2001* (June 2002) at 18, 38, *available at* http://www.usda.gov/gipsa/pubs/01assessment/01assessment.pdf.

The problems caused by this transformation have not been addressed through the Packers and Stockyards Act or existing antitrust provisions. For the past several years, farmers, through organizations like WORC and CFF, have been advocating for Congress and USDA to take the necessary steps to create a free and open market in which farmers can compete.

On October 8,1996, WORC submitted to the Secretary of Agriculture a petition asking the Secretary to issue rules that: (1) prohibit packers from procuring cattle for slaughter through the use of a forward contract unless the contract contains a firm base price that can be equated to a fixed dollar amount on the day the contract is signed and the forward contract is offered or bid in an open, public manner; and (2) prohibit packers from owning and feeding cattle, unless the cattle are sold for slaughter in an open, public market. WORC's petition for rulemaking included a discussion of the many economic studies that addressed the impact of concentration on prices.

USDA published the petition and sought comment on January 14, 1997. *See* 62 Fed. Reg. 1845. On September 21, 2000, USDA held a public forum on captive supplies in Denver, Colorado. At that forum, the authors of many of the economic studies on the effects of concentration and captive supplies on livestock markets were invited and presented their views. Since that date, WORC's request has languished in USDA's offices; USDA has taken no action on WORC's petition for rulemaking.

In both 2001 and 2002, CFF and WORC led grassroots efforts to convince Congress to pass a ban on packer ownership as part of the 2002 Farm Bill. That bill would amend the Packers and Stockyards Act to prohibit packers from owning livestock more than seven days prior to slaughter. The bill passed the United States Senate twice. Although the House of Representatives eliminated the packer ban amendment in conference committee last May, the bill has been reintroduced in both the House (H.R. 719) and the Senate (S. 27).

Also in response to grassroots efforts led by WORC and CFF, the Captive Supply Reform Act was introduced in the Senate (S. 1044). The Captive Supply Reform Act would amend the Packers and Stockyards Act to prohibit the use of certain anti-competitive forward contacts.

These bills have not yet been brought to a floor vote.

History of Studies

In the petition for rulemaking submitted by WORC in October 1996, WORC summarized the large body of research establishing a high positive relationship between the level of packer concentration and prices paid to producers. In the intervening years, many more studies have been conducted, some by GIPSA. As the supplementary information in the notice acknowledges, there is agreement that these studies have shown a correlation between captive supplies and lower spot market prices. GIPSA's January 11, 2002, report, "Captive Supply of Cattle and GIPSA's Reporting of Captive Supply," pp. 58, 60, 61, reaffirms the same conclusion.

USDA already has spent considerable resources looking at the issue of concentration in the meat industry. On February 14, 1996, USDA convened an advisory committee to investigate concentration in the agricultural economy. That committee reviewed the many studies on the issue, including GIPSA's *Concentration in Agriculture: A Report of the USDA Advisory Committee on Agricultural Concentration*. The committee released its findings and recommendations on June 6, 1996, in *Concentration in Agriculture: A Report of the USDA Advisory Committee on Agricultural Concentration*. That report concluded that:

> The level of concentration is historically high and growing higher in meat packing. The merger movement of the past decade has contributed to the increasing concentration throughout the agricultural economy. *This concentration increases the opportunity to both use and abuse market power.*

The report further concluded that "Captive supply and other forms of vertical integration and coordination at levels in which they occur—in some regions and at some times of the year—are potentially detrimental to both competition and price discovery."

These conclusions alone are a sufficient basis for Congress to take immediate steps to affirmatively address the dangers of concentration and captive supply.

Another study is not necessary in order for Congress and USDA to take appropriate action

The effects of concentration and captive supply on independent farmers cannot be understated. Lower prices and lack of access to competitive markets have made it nearly impossible for independent farmers to break even or earn a profit that provides a livable wage. Independent farmers are leaving farming in alarming numbers. For example, as concentration in the hog industry has increased and prices to hog farmers decreased, the number of hog farmers has plummeted from 500,000 in the mid-1980s to 85,000 at year-end 2000. By year-end 2001, that number had dropped to 81,130, and it fell to 75,350 by the end of 2002. *Hogs and Pigs Report* (Dec. 30, 2002), *available at* http://jan.mannlib.cornell.edu/reports/nassr/livestock/php-bb/2002/hgpg1202.txt.

In 1998 and the beginning of 1999, hog prices hit a record low–below ten cents per pound—while the average break-even price was 39 cents per pound. Becker, *Hog Prices: Questions and Answers*, Congressional Research Service (Dec. 15, 1999), *available at* http://www.ncseonline.org/NLE/CRSreports/Agriculture/ag-68.cfm. USDA statistics show that more than 15,000 hog farmers (about 14 percent) quit producing hogs in that time period. USDA National Agricultural Statistics Service, *Hogs and Pigs Report* (Dec. 28, 1999), *available at* http://jan.mannlib.cornell.edu/reports/nassr/livestock/php-bb/1999/hgpg1299.txt. While hog prices were at record lows, retail pork prices did not decline accordingly (*see* Becker) and at the same time, Smithfield posted near-record profits. In Smithfield's annual report, Smithfield Chairman Luter made the following statement correlating Smithfield's 1999 profits and the historic low hog prices:

> I am pleased to report that Smithfield Foods, Inc. reported net income of $75 million, or $1.52 per diluted share, for the year ended April 30, 2000. While we are disappointed that these earnings are down from the record earnings reported last fiscal year, they still represent the second-best performance in our history; second only to last year when hog prices reached their lowest level in five decades. *These unprecedented low prices resulted in very favorable fresh pork margins for a substantial portion of fiscal 1999 and were the driving force behind last year's results.*

See Joseph W. Luter, III, *To Our Shareholders,* Smithfield Foods, Inc. 2000 Annual Report (July 7, 2000), *available at* http://www.smithfieldfoods.com/invest/pdf/letter.pdf (emphasis added).

To the farmers who are struggling to survive, it is irrelevant whether there is a correlation between concentration and lower prices or whether economists agree that concentration causes low prices. They know that they are unable to negotiate a better price for their livestock because the packer does not need their livestock, since it has access to its own captive supply to control price. As former IBP chairman, Robert Peterson, openly noted: ". . . not formula cattle but packer-fed cattle, which can be killed early or late to fill a particular time frame, be it a day or a week, grant the packer far greater flexibility to move in and out of the market. On the way down [in price], he kills his cattle first and on the way up, last." Robert Peterson address to 1994 Kansas Livestock Convention, *quoted in* Connor, Carstensen, McEowen, and Harl, *The Ban on Packer Ownership and Feeding of Livestock: Legal and Economic Implications*, *available at* harkin.senate.gov/specials/20020313-packer-report.pdf.

Moreover, there are limitations on what any economic study can show. Economic studies are not designed or able to show collusion or intent to manipulate a market. Economists do not have the tools to make such inquiries. In these times of budget shortfalls and record deficits, spending $4.5 million on a study that can do no more than what dozens of other studies have already done is at the least wasteful and is more likely unconscionable.

Action must be taken now to level the playing field for independent livestock farmers. Farmers want access to fair, open and competitive markets. Competition is the touchstone of our economic system. A correlation between concentration and captive supply, on the one hand, and lower prices to producers, on the other, is undisputed. That correlation is sufficient for Congress to take action. A demonstration of cause and effect is unnecessary for Congress to enact a policy that will help to preserve independent family farms. Congress has not required definitive proof when it has enacted other laws that were intended to preserve fair competition, such as the Sherman and Clayton Antitrust Acts, or laws relating to fair and open trading in the commodities markets and securities markets. For example, Congress recently enacted the Sarbanes-Oxley Act of 2002 with minimal hearings and no in-depth study in response to the public outcry over corporate financial accounting scandals.

As Senator Enzi stated when introducing the captive supply bill: "[W]e are having a crisis . . . anywhere that there are people who raise livestock. The crisis comes about as a result of neither fair trade nor free trade-in fact, [it has come about from] the elimination of both." Statement of Senator Enzi, Congressional Record, May 13, 2003, page S6078. The way to preserve open and fair competition is to pass the two bills now pending in Congress: the packer ban bill (H.R. 719 and S. 27) and the captive supply bill (S. 1044). These bills need to be voted on and passed *this session*, and not deferred until after an expensive and redundant study is completed.

Any study conducted should investigate areas that have not been studied

The notice in the Federal Register sets forth the objectives and phases of the proposed study. Most of the information described in the notice has already been studied in depth (*e.g.,* why firms enter into various contract arrangements with producers). If any study is to be conducted, the scope of the study include areas that have not yet been investigated, such as how packers profit from captive supply arrangements; how they structure the profits from those arrangements; how the profits are attributed, accounted for, and measured; and how they are treated for tax purposes. That information would be useful to show the real benefits to packers of captive supplies, and is important for effective enforcement of the Packers and Stockyards Act.

Any studies on packer concentration should include those most knowledgeable about this area

Any study relating to "packer concentration" must include persons who are most knowledgeable about that topic and have studied it thoroughly, including: Peter C.

Carstensen, Young-Bascom Professor of Law, University of Wisconsin School of Law; Catherine A. Durham, Professor of Agricultural and Resource Economics, Oregon State University; Neil E. Harl, Charles F. Curtiss Distinguished Professor in Agriculture and Professor of Economics, Iowa State University; William Heffernan, Professor of Rural Sociology, University of Missouri; Roger A. McEowen, Associate Professor of Agricultural Economics and Extension Specialist, Agricultural law and Policy, Kansas State University; and C. Robert Taylor, Alfa Eminent Scholar and Professor of Agricultural Economics, Auburn University.

Conclusion

The Western Organization of Resource Councils and the Campaign for Family Farms believe that the proposed study is redundant and an unnecessary expenditure of taxpayer money. Many distinguished scholars have studied the issue of concentration in the meat packing industry for several years. There is no dispute about the correlation between concentration and captive supplies and lower prices to producers. That correlation is sufficient to warrant action without further study. **The action that is necessary to preserve an open, fair, and competitive market is not another study, but rather for Congress to pass the captive supply bill and the ban on packer ownership.**

Sincerely,

FARMERS' LEGAL ACTION GROUP, INC.

Susan E. Stokes
Legal Director
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cc: Senator Kent Conrad
Senator Thomas Daschle
Senator Mark Dayton
Senator Byron Dorgan
Senator Michael Enzi
Senator Charles Grassley
Senator Tom Harkin
Senator Tim Johnson
Senator Craig Thomas

Representative Doug Bereuter
Representative Leonard Boswell
Representative Barbara Cubin
Representative Baron Hill
Representative William Janklow
Representative Steve King
Representative Dennis Kucinich
Representative Nicholas Lampson
Representative Jim Leach
Representative Jim Nussle
Representative Earl Pomeroy